

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

|                      |   |                          |
|----------------------|---|--------------------------|
| ROBERT J. McCORMACK, | ) |                          |
|                      | ) |                          |
| Claimant,            | ) | <b>IC 01-011245</b>      |
| v.                   | ) |                          |
|                      | ) |                          |
| ALL VALLEY CONCRETE, | ) |                          |
|                      | ) |                          |
| Employer,            | ) | <b>ORDER DENYING</b>     |
|                      | ) | <b>RECONSIDERATION</b>   |
| and                  | ) |                          |
|                      | ) | Filed September 25, 2006 |
| EVEREST NATIONAL     | ) |                          |
| INSURANCE COMPANY,   | ) |                          |
|                      | ) |                          |
| Surety,              | ) |                          |
| Defendants.          | ) |                          |
|                      | ) |                          |

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On August 15, 2006, Claimant filed a Motion to Reconsider the Commission decision dated July 27, 2006, together with a brief in support of the motion. Rule 3(f), JRP. Defendants responded on August 22, 2006.

Claimant argues the Commission must “make a determination of Claimant’s pre- and post-injury earning capacity,” and that the Commission failed to do so in this case. Claimant believes the Commission cannot determine disability or loss of earning capacity without the aforementioned finding, citing to Idaho Code §§ 72-102(11), -423 and -430. Claimant further debates the Commission’s finding regarding Claimant expert Deb Uhlenkott and the separate finding regarding the Tribal Employment Rights Office (TERO).

Defendants argue Claimant’s inability to engage in gainful employment was due to his own perception that he is disabled, instead of true permanent impairment. Defendants continue by arguing the Commission must only consider pre- and post-injury

wages as a small factor among many other factors, and not as the paramount factor Claimant paints it to be.

While Claimant's argument regarding pre- and post-injury earning capacity is lucid, it is not the law. The Supreme Court has directed the Commission to make disability determinations on the basis of "ability to engage in gainful activity." *Baldner v. Bennett's*, 103 Idaho 458, 462, 649 P.2d 1214, 1218 (1982). The Supreme Court has not directed the Commission to use every factor outlined in Idaho Code § 72-430 when determining disability. Furthermore, neither of Idaho Code §§ 72-423 or -430 actually refer to, or require a determination of a claimant's pre- or post-injury earning capacity. The Commission is to determine disability based on medical impairment and the nonmedical factors of §72-430. As shown by Idaho Code §§ 72-102(11), -423, -430 and *Baldner*, the factors outlined in the statute are not exclusive, nor are they all required to be used. A full analysis of a claimant's "ability to engage in gainful activity" is the requisite key to a disability analysis.

In the case at hand, the Commission noted the requirements of Idaho Code §§ 72-423, -424, -425 and 430(1). Furthermore, before assessing Claimant's disability the Commission considered Claimant's impairment rating, opinions of vocational professionals, Claimant's access to TERO as a job resource, Claimant's medical restrictions, age, education, his local labor market as well as other medical and nonmedical factors. The Commission engaged in a full legal and factual analysis before making a finding regarding disability in this case.

Claimant's issues concerning Uhlenkott and TERO are mere disagreements with the Commission decision of July 27, 2006. Claimant provides no factual or legal basis to warrant a contrary analysis of the findings regarding Uhlenkott and TERO.

For the above reasons, Claimant's Motion to Reconsider is hereby DENIED.

DATED this \_26th\_\_ day of September 2006.

INDUSTRIAL COMMISSION

\_\_\_\_\_/s/\_\_\_\_\_  
Thomas E. Limbaugh, Chairman

\_\_\_\_\_/s/\_\_\_\_\_  
James F. Kile, Commissioner

\_\_\_\_\_/s/\_\_\_\_\_  
R. D. Maynard, Commissioner

ATTEST:

\_\_\_\_\_/s/\_\_\_\_\_  
Assistant Commission Secretary

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_26th\_\_ day of \_\_\_\_\_September\_\_\_\_\_2006, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION** was served by regular United States Mail upon each of the following:

CHRISTOPHER CALDWELL  
P.O. BOX 607  
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GLENNA M. CHRISTENSEN  
P.O. BOX 829  
BOISE, ID 83701

\_\_\_\_\_/s/\_\_\_\_\_